No. 17-587

IN THE
Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,
Petitioner,
v.

JOHN GUIDO AND DENNIS RANKIN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION AND NELA SUPPORTING RESPONDENTS AND URGING AFFIRMANCE

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STATEMENTS OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation litigate and file amicus briefs to address employment practices and other conduct that threaten the financial security and well-being of older Americans. In particular, they are active in trial and appellate matters nationwide seeking vigorous enforcement and proper interpretation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA"). *See, e.g., Ky. Ret. Sys.* v. *EEOC,* 554 U.S. 135 (2008) (AARP amicus brief supporting respondent and affirmance); *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) (AARP amicus brief supporting petitioners and

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[1] Pursuant to the Court's Rule 37.6, amici state that this brief was not authored in whole or in part by any party or their counsel, and that no person other than amici, their members, or their counsel contributed any money that was intended to fund the preparation and submission of this brief. Pursuant to this Court's Rule 37.2(a), letters by both parties consenting to the filing of amicus briefs are on file with the Court.

reversal); *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996) (same); *Hoffmann-La Roche* v. *Sperling*, 493 U.S. 165 (1989) (AARP amicus brief supporting respondents and affirmance); *Taaffe* v. *Drake*, No. 2:15-cv-02870, 2016 U.S. Dist. LEXIS 57397 (S.D. Ohio, Apr. 29, 2016) (denying motion to dismiss ADEA action under *Ex parte Young*, 209 U.S. 123 (1908), seeking injunctive relief against state education administrators acting in their official capacity); *Harpham* v. *City of Dublin*, No. 2:12-cv-01069 (S.D. Ohio, Nov. 20, 2012) (complaint against municipality alleging violation of ADEA in the provision of health-related employment benefits).

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated unlawfully in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

This case addresses several issues of tremendous importance to amici and older workers they routinely represent. First, Petitioner Mt. Lemmon Fire District ("MLFD"), in seeking reversal of the Ninth Circuit's construction of Sections 630(a) and (b) of the ADEA, which define "employers" and "persons" covered by the Act, distorts settled principles of statutory construction articulated in this Court's prior decisions. Second, Petitioner, in trying to persuade this Court to adopt an identical reading of provisions of the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), mischaracterizes the Court's careful efforts, over more than five decades, to navigate similarities and differences between the texts, contexts, and histories of the ADEA, Title VII, and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, et seq. ("FLSA"). Amici submit that principles stated in these diverse rulings, not a simplistic rule of conformity, should determine whether the two statutes' coverage-related definitions should be interpreted alike or not. Third, Petitioner greatly exaggerates potential adverse effects on small state and local public entities of having to comply with the ADEA.

Amici respectfully submit that this case presents an opportunity to correct a significant, longstanding error in the application of Sections 630(a) and (b) of the ADEA. Several circuit courts, following *Kelly* v. *Wauconda Park Dist.*, 801 F.2d 269 (7th Cir. 1986), have failed to recognize key differences between the text of the ADEA and Title VII and, thus, in their coverage of small public entities. This unduly restrictive reading of the ADEA has for decades denied

redress under federal age discrimination law for many thousands of employees of small political subdivisions in those jurisdictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court frequently has had occasion to discuss the 1974 amendment to the ADEA, enacted as Section 28 of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974) ("1974 Act"). *See, e.g., Gomez-Perez* v. *Potter,* 553 U.S. 474, 489 (2008) (upholding retaliation claims under the broad prohibition of "discrimination" in the ADEA's federal sector provision, § 633a, added by the 1974 Act); *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 68 (2000) (recognizing 11th Amendment limits to the ADEA's application to state employers, another feature of the 1974 Act). Yet, this case addresses, for the first time, the precise question of the size of state and local government "employers," in terms of numbers of employees, covered by the 1974 Act.

Petitioner MLFD displays considerable creativity in construing the 1974 Act not to cover small state and local government entities. But in doing so, MLFD sacrifices fidelity to this Court's careful parsing of the ADEA over the past half century, consistent with settled principles of statutory construction and with indicia of the ADEA's status as "a hybrid" of the FLSA and Title VII. *McKennon* v. *Nashville Banner Publ. Corp.*, 513 U.S. 352, 357 (1995) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 578 (1978)).

Respondents John Guido and Dennis Rankin secured from the Equal Employment Opportunity Commission ("EEOC") rare findings of "reasonable cause to believe the Fire District violated the [ADEA]," Pet. App. 3a, by terminating them in 2009, at ages 46 and 54, *id.* 20a n.3, respectively, and replacing them with younger employees, including a 28-year-old. Pls. Rule 56.1 Statement of Facts ¶ 33. Guido and Rankin had worked for MLFD since 2000, "served as full-time firefighter Captains," Pet. App. 3a, and established favorable work records, Pls. Rule 56.1 Statement of Facts, ¶¶ 6-11, 13-14, 24.

An Arizona federal district court declined to consider the former firefighters' claims of age bias on their merits. Instead, the court dismissed the suit on summary judgment because the MLFD had fewer than twenty employees during the relevant years (2008 and 2009) and, thus, the court concluded, MLFD was not an "employer" covered by § 630(b) of the ADEA. Pet. App. 26a. The Ninth Circuit reversed, ruling that § 630(b) does not impose a minimum-employee threshold for non-federal public entities, but covers such entities of all sizes. *Id.* 17a. This Court granted certiorari to resolve the Ninth Circuit's disagreement with other Courts of Appeals that have addressed whether the ADEA has a minimum-employee threshold for covered state and local public employers.

ARGUMENT

I. UNDER SETTLED STATUTORY CONTRUCTION PRINCIPLES, SECTION 630(b) OF THE ADEA APPLIES TO NON-FEDERAL PUBLIC EMPLOYERS REGARDLESS OF THE NUMBER OF EMPLOYEES THEY HAVE.

An "employer" to whom ADEA prohibitions apply:

> means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. § 630(b). The question before the Court is whether the "twenty-employee minimum" identified in § 630(b)'s first sentence, which encompasses private-sector employers, "also applies to a 'political subdivision of a State,'" Pet. App. 5a, the subject of the latter numbered clause of § 630(b)'s second sentence. The Court of Appeals held it unambiguously does not.

Id. 17a. MLFD contends otherwise. Amici submit that the Ninth Circuit was right and MLFD is in error.[2]

A. The plain text of Section 630(b) unambiguously covers all non-federal public employers.

It is well-settled that "when the statutory language is plain," this Court "must enforce it according to its terms." *Millbrook* v. *United States,* 569 U.S. 50, 57 (2013). *See also* Pet. App. 5a n.1 ("If the 'statutory text is plain and unambiguous[,]' we 'must apply the statute according to its terms.'") (quoting *Carcieri* v. *Salazar,* 555 U.S. 379, 387 (2009)). Indeed, for over a century this Court has reaffirmed that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms," *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2009) (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.,* 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (in turn quoting

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[2] MLFD also claims that failing to read a minimum-employee coverage criterion for non-federal public entities implies: (i) that such entities are not subject to the "agent" clause of the second sentence and, thus, are not subject to respondeat superior liability for misconduct of their agents; and (ii) that they are not subject to the "affecting commerce" language of the first sentence and, thus, may be constitutionally barred from ADEA liability. Amici agree with Respondents that these claims are unfounded, but do not address them further. In addition, the parties suggest that personal liability for certain individual "agents" of covered "employers" is consistent with Respondents' reading of § 630(b). Amici concur. However, such questions were not addressed below and, thus, should not be decided in this case.

United States v. *Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989) (and in turn quoting *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917)).

The admonition to honor the plain meaning of unambiguous statutory text is particularly relevant where, as here, a court is invited "to read [a specific] limitation [appearing in "neighboring provisions"] into unambiguous text" that does not contain the desired limiting language. *Millbrook* v. *United States*, 569 U.S. at 57. MLFD asks this Court to conclude that the text of § 630(b) is ambiguous and, accordingly, to reach far beyond "its terms"—to examine alleged implicit meanings and vaguely stated legislative intentions—and then to read into its second sentence a non-existent twenty-employee limitation appearing in the first. The Court should reject this request to construe § 630(b) contrary to its terms and unambiguous meaning.

For the reasons set forth above and in Respondents' opening brief, the Court should affirm the Ninth Circuit's holdings that "the meaning of § 630(b) is not ambiguous," and that "there is no valid justification to depart from the plain meaning" of § 630(b). Pet App. 14a.

B. The enactment history of the ADEA, and of Section 630(b) in particular, confirm that the ADEA covers non–federal public employers of all sizes.

Given the indicia that § 630(b)'s meaning is unambiguous, Petitioner has a heavy burden to justify a wider inquiry. In such circumstances, restraint is required: "We have to read [the ADEA] the way Congress wrote it." *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 102 (2008) (rejecting policy-based arguments purporting to trump clear textual evidence that the ADEA's "reasonable factors other than age" provision, 29 U.S.C. § 623(f)(1), creates an affirmative defense to disparate impact liability, for which employers bear the burden of proof). *See* Pet. App. 15a (citing *Meacham,* 554 U.S. at 102).

Putting aside for the moment Petitioner's novel approaches to construing the ADEA's text (*see* Section I.C. below), it is instructive to examine the Court of Appeals' approach to extra-textual sources. The Ninth Circuit focused on text, rather than less definitive evidence of Congress's intent in crafting § 630(b). That is, the Court of Appeals looked to "the parallel [1972] amendment to Title VII," Pet App. 15a, which amended Title VII to extend its coverage to federal and non-federal public entities. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) ("1972 Act"). Comparing the 1972 Act to the 1974 Act, the Ninth Circuit sensibly observed:

> Congress used different language in the 1974 ADEA Amendment, which changes the ADEA's meaning relative to Title VII, and such Congressional choice must be respected. *See Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, [570 U.S. 338, 353] (2013). If Congress had wanted the 1974 ADEA Amendment to achieve the same result as the 1972 Title VII Amendment, it could have used the same language.

Pet. App. 15a.[3] The Court of Appeals' citation to *Nassar* references this Court's decree therein that "[j]ust as Congress' choice of words is presumed to be deliberate, so too are its structural choices. *See* [*Gross* v. *FBL Fin. Servs. Inc.*], 557 U.S. [167,] 177 n.3 [(2009)]." 570 U.S. at 353. *Nassar* thereby relied on *Gross*'s reasoning, equally applicable here, that "giv[ing] effect to Congress'[s] choice" is the proper course when "Congress [has] amended Title VII . . . but did not similarly amend the ADEA." 557 U.S. at 177 n.3.[4]

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[3] In the 1972 Act amending Title VII, Congress defined "[t]he term 'person'" expressly to "include[] one or more individuals, *governments, governmental agencies, political subdivisions . . . ,*" and in the next subsection, defined "[t]he term 'employer' [to] mean[] a person engaged in an industry affecting commerce who has fifteen or more employees . . . ." 42 U.S.C. § 2000e(a), (b) (emphasis supplied). In contrast, the ADEA's definition of "person" contains no reference to governmental entities. *See* 29 U.S.C. § 630(a).

[4] In *Gross* and *Nassar*, the Court also spoke of the Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1079 (1991), in which Congress amended both the ADEA and Title VII to different effect. And "as the Court has explained, 'negative implications

In contrast, the Court of Appeals properly gave much less credence to bits and pieces of legislative history that "did not address the specific question before us" and "never state[d] that the twenty-employee minimum should apply to political subdivisions." Pet. App. 16a. (discussing "a Senate report written a year before the bill was passed," a later "House report," and "two floor statements," one of them from 1972, purporting to convey Congress's intent in 1974 that "the same rules apply" to public and non-public employers). The Ninth Circuit concluded that such "vague language" was inadequate to "override the plain meaning of [§ 630(b)]." *Id.*

The same reasons caused the Court of Appeals to appropriately criticize the Seventh Circuit in *Kelly v. Wauconda Park Dist.*, 801 F.2d 269 (7th Cir. 1986), for being "led . . . astray" by a "focus on divining congressional intent, rather than determining the ordinary meaning of the text" and, as a result, concluding that § 630(b) is ambiguous and susceptible to a reading whereby all employers with fewer than 20 employees are exempt from coverage. Pet. App. 15a. This Court likewise should determine that in this instance, it "need not read minds to read text." *Id.*

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raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.' *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)." *Gross*, 557 U.S. at 168. But it is surely also compelling evidence of § 630(a)'s meaning that in 1974 Congress amended the ADEA to extend coverage to federal and non-federal public entities, quite like it did in 1972 to Title VII, yet only in Title VII did Congress specifically limit coverage of state and local public entities to employers with a minimum number of employees.

Kelly's superficial analysis of the 1972 Act, which Petitioner wisely does not champion, undermines the notion that four circuit court decisions "rely[ing] entirely on *Kelly*'s reasoning" amounts to "a powerful rebuttal" to the plain text of § 630(b). Pet. App. 11a. For instance, the *Kelly* court was utterly at odds with this Court's statutory construction jurisprudence when it mused that "[j]ust because the language of a subsequent statute [the 1974 Act] is not identical to the earlier statute on which it was modeled [the 1972 Act], we do not necessarily assume that Congress intended to change the meaning." 801 F.2d at 272. On the contrary, as *Nassar* and *Gross* testify, such differences in text, particularly in regard to provisions in related statutes having a similar overall purpose, should be presumed intentional.[5]

Kelly also stumbled in finding the history of the Fair Labor Standards Amendments of 1974 to be barren of "any reason for the different language" in § 28, amending the ADEA, in contrast to the 1972 Act, amending Title VII. *Id.* On its own, the title of the law including and giving life to § 28 is highly suggestive. And the fact that in 1974, Congress contemporaneously extended to all public entities the FLSA protections that previously applied to private employers of all sizes is still more powerful evidence that Congress had the same goal in mind when it

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[5] Moreover, "a change in the language of a prior statute presumably connotes a change in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 256 (2012).

adopted "different language" in amending the ADEA, than it did in 1972, in amending Title VII.

The Seventh Circuit also failed to discuss the report of the House Committee on Education and Labor accompanying the text that, with minimal changes, President Nixon ultimately signed into law as the 1974 FLSA (and ADEA) amendments. H.R. Rep. No. 93-913 (1974). That report described the extension of ADEA coverage to public entities as a "logical extension of the . . . decision to extend FLSA coverage to Federal, state and local governmental employees." *Id.* at 40.[6] And it is undisputed that the 1974 Act extended the FLSA to cover public employers of all sizes. *See* 29 U.S.C. § 203.

Petitioner likewise ignores the FLSA, while selectively addressing the supposed statutory context in which the ADEA has evolved, as "part of a trio of

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[6] The report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 93-690, at 55 (Feb. 22, 1974) (to accompany S. 2747, the Fair Labor Standards Amendments, 93rd Cong. introduced Nov. 27, 1973), contains identical language. The Senate committee report further cemented the connection between the FLSA and the 1974 Act's extension of coverage to public employers in § 630(b), stating: "The Committee recognizes that the omission of government workers from the [ADEA] did not represent a conscious decision by the Congress to limit the ADEA to employment in the private sector. It reflects the fact that in 1967, when ADEA was enacted, most government employees were outside the scope of the FLSA and the Wage Hour and Public Contracts Divisions of the Department of Labor, which enforces the [FLSA], were assigned responsibility for enforcing the [ADEA]." *Id.*

. . . statutes," including Title VII and the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327, 42 U.S.C. §§ 12101, et seq. (1990) ("ADA"). Pet. Br. at 44. Petitioner's presentation cites passages from *McKennon* and *Lorillard,* conveniently ignoring that both describe the ADEA as "something of a hybrid" between Title VII and the FLSA. *McKennon*, 513 U.S. at 357 (citing *Lorillard*, 434 U.S. at 578).[7] Certainly the FLSA is a better reference point than the ADA, which Congress did not enact until sixteen years after the 1974 amendment to the ADEA.

C. No valid basis exists for the assertion that Section 630(b)'s first sentence covers local political subdivisions and that its second sentence merely clarifies the first.

Petitioner's construction of § 630(b) is novel and untethered to precedent or traditional methods of statutory analysis. Respondents present compelling rebuttals to many of Petitioner's theories. Yet a few other significant defects in the case against applying the ADEA to MLFD are worthy of the Court's attention.

The crux of Petitioner's case is that "statutory context can overcome the ordinary . . . meaning" of the

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[7] This is a sufficient basis, together with the House and Senate report passages noted above, to ignore the Seventh Circuit's misguided conclusion, which Petitioner also does not endorse, that "Congress's intent in amending the FLSA has no bearing on the interpretation of section 630(b)." *Kelly*, 801 F.2d at 271 n.2.

ADEA. Pet. Br at 34. Petitioner builds an elaborate superstructure of "context" founded on the proposition that the words "organized groups of persons" within the term "person" in § 630(a) has always included governmental entities, to whom § 630(b)'s employee-minimum, in the definition of "employer," applies. Section 630(b)'s remaining text, referring to agents and non-federal public entities, Petitioner continues, is merely "clarifying."

One appropriate response to this contorted reading of the plain text of § 630(a) and (b)—especially given Congress's straightforward expansion of Title VII in 1972 by adding words describing public entities to the definition of "person"—is to recall the Court's conclusion in analogous circumstances that "[g]iven this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope." *Nassar*, 570 U.S. at 353 (citing *Gardner* v. *Collins*, 27 U.S. 58, 2 Pet. 58, 93, 7 L. Ed. 347 (1829) ("What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words")); *see also Ky. Ret. Sys.* v. *EEOC*, 554 U.S. at 151 ("the most straight forward reading of the [ADEA] is the correct one") (Kennedy, J. dissenting).

Petitioner's counterintuitive interpretation of the term "person" is not actually consistent with any of the circuit decisions MLFD invokes. *Kelly* and the two circuit decisions relying on it do not discuss this

theory at all.[8] And *Cink* v. *Grant Cty.*, 635 Fed. App'x 470 (10th Cir. 2015), is at best opaque on this point.

Petitioner misleads by citing *Cink*, 635 Fed. App'x at 472 n.4, as "explicitly h[o]ld[i]ng that 'persons' must be read to 'include political subdivisions.'" Pet. Br. 25. Yet, *Cink* merely asserts, incorrectly, without analysis or explanation, that as "to employer status under the ADA, ADEA and Title VII [,] [t]here are no material differences in these statutes for our purposes. All refer broadly to a 'person' (specified, or judicially interpreted, to include political subdivisions) . . . ." *Id.* Neither *Cink* nor Petitioner provides any such "judicial interpret[ation]" of the term "person" as encompassing state and local subdivisions under the ADEA.[9]

Petitioner also misfires in trying to enlist the text of § 630(c) in its cause. *See* Pet. Br. at 22-23. Section 630(c) defines "employment agenc[ies]" subject to ADEA liability. These are "persons" recruiting potential employees for "employers." Petitioner fastens on § 630(c)'s exclusion of federal entities; to require exclusion, they must otherwise be included in "persons" and, what's more, state and local governments also must be within the definition. Yet, § 630(c) establishes such ADEA-covered entities

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[8] *Palmer* v. *Ark. Council on Econ. Educ.*, 154 F.3d 892 (8th Cir. 1998); *EEOC* v. *Monclova Twp.*, 920 F.2d 360 (6th Cir. 1990).

[9] Petitioner also misrepresents brief discussions of the term "employer" in *Palmer, Monclova* and *Kelly* as endorsing its elaborate theory, simply because the "definition [of "employer"] centers on 'persons.'" Pet. Br. at 25.

without imposing a minimum employee limit. Hence, if anything, § 630(c) supports Respondents' reading of § 630(b), because § 630(c) creates a class of ADEA-covered "persons" that can be liable in that capacity, regardless of how many employees they have. Petitioner's attempt to draw a meaningful parallel between § 630(b) and (c) falls flat. Even if Petitioner is right that non-federal government employment agencies are "persons," Pet Br. at 23, this does Petitioner no good. The only "employers" subject to a twenty-employee minimum by § 630(b) are described in a different sentence than the sentence describing non-federal public employers. And there is no reference in § 630(c) to non-federal entities at all.

II. HAVING DECIDED THAT THE ADEA IS A "HYBRID" OF THE FLSA AND TITLE VII, THE COURT SHOULD CONSTRUE SECTION 630(b) BASED ON THE FLSA'S CLOSELY RELATED TEXT AND CONTEXT, NOT ON A NOTION THAT THE ADEA AND TITLE VII REQUIRE CONSISTENT INTERPRETATION.

A central, errant theme of Petitioner's argument is that special rules of presumptive conformity and consistency envelop federal employment discrimination laws and dictate this case's outcome. MFLD contends that were this Court to ascribe meaning to an ADEA "employer" that differs from the meaning of that term under Title VII's plainly differing text, it would create troubling "tension with comparable antidiscrimination laws," Pet. Br. at 5-6, "inexplicable disparities in the ADEA's

treatment of public and private employers," *id.* at 16, and, indeed, would cause the ADEA to "bear no resemblance to" other federal employment bias laws' treatment of employers "in the public sector—even as it closely tracks them in the private sector," *id.*

This recitation of horribles sounds a false alarm. It wholly mischaracterizes the nuanced nature of the Court's exegesis of ADEA provisions over the past half century. Rather than mechanically applying rigid presumptions, this Court has carefully parsed the two principal influences on the ADEA's text, i.e., the FLSA and Title VII. The diverse results of these assessments favor a similar approach here. No artificial rule of thumb should divert the Court from recognizing what statutory construction canons and the 1974 Act's context show: strong parallels between FLSA and ADEA coverage of public entities and distinct ADEA and Title VII meanings of the term "employer."

A. This Court has repeatedly rejected the notion that corresponding provisions of the ADEA and Title VII must have identical meaning, especially where, as here, parallels with the FLSA are compelling.

The ADEA's FLSA origins are a critical motif in this Court's ADEA decisions over the years. That theme is highly relevant here, yet, decidedly inconsistent with Petitioner's objections to deviating from Title VII's model.

While *Lorillard* states that the ADEA and Title VII share similar "aims—the elimination of discrimination"—and, further, that the ADEA's prohibitions "were derived in haec verba from Title VII," 434 U.S. at 584, the overwhelming focus of *Lorillard* is that, with respect to jury trials, the ADEA must be construed like the FLSA, not Title VII. *Id.* at 585. In reaching that result, this Court stressed that the ADEA explicitly declares that it "be enforced in accordance with the 'powers, remedies, and procedures'" of the FLSA. *Id.* at 580 (citing § 7(b) of the Act, 29 U.S.C. § 626(b)); *see also Hoffman-LaRoche* v. *Sperling*, 493 U.S. 165, 167 (1989) (same). Further, the Court observed that in 1967, "Congress exhibited . . . a detailed knowledge of the FLSA provisions and their judicial interpretation," *id.* at 581, and also "selectivity . . . in incorporating . . . FLSA practices [that] strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Id.* at 582.

Hence, in *Lorillard*, this Court refused to preclude a right to a jury trial in private civil actions for lost wages under the ADEA simply because Title VII did not provide such a right. *Id.* at 577, 582, 585. Rather, the Court found "[f]ollowing the model of the FLSA'[s]" enforcement mechanisms to be the logical course. *Id.* at 579. The Court expressed no regret about causing "tension" between "sister" statutes, or reducing their "resemblance" to one another. *See* Pet. Br. at 5-6, 16. On the contrary, the Court described the "petitioner's argument by analogy to Title VII

unavailing" and its reflexive "reliance on Title VII . . . misplaced." 434 at 584, 585.

In extending ADEA coverage to public entities as part of the 1974 FLSA amendments, Congress was just as mindful of the FLSA's text and its implications, and just as selective in incorporating FLSA practices as in 1967. *See Kimel* v. *Fla. Bd. of Regents*, 528 U.S. at 68, 76-78 (describing the 1974 Act as "a statute consisting primarily of amendments to the FLSA" and discussing in detail related provisions of the 1974 Act amending both the ADEA and FLSA and "mak[ing] it more than clear that Congress understood the consequences of its actions" in doing so). Hence, the same conclusion as in *Lorillard* is warranted here. That is, absent any specific, explicit textual or other evidence that Congress intended to deviate from FLSA coverage practices—i.e., including public employers of all sizes—such intent should not be imputed.

Finally, in considering how to construe ADEA text that, as here, does not fall neatly into either the category of the Act's "prohibitions" or, rather, its "powers, remedies, and procedures," this Court has looked to *both* the FLSA and Title VII. Thus, in *McKennon* v. *Nashville Banner Publ. Corp.*, the Court noted, in assessing proper remedies for after-acquired evidence of wrongdoing under the ADEA, that a private right of action is a "vital element found in both Title VII and the Fair Labor Standards Act." 513 U.S. at 358.[10]

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[10] In still other circumstances, the Court has looked beyond both the FLSA and Title VII to discern the proper meaning of the

B. This case is like others where the Court has diverged from Title VII in construing the ADEA and, further, is distinguishable from instances where the Court has adopted the same reading of both laws.

This Court has construed the ADEA and Title VII in parallel in some appropriate instances, but more often than not, it has declined to do so, stressing the importance of subtle distinctions between these and other employment discrimination laws. *See, e.g., Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 393 (2008) (noting that "EEOC enforcement mechanisms and statutory waiting periods for ADEA claims differ in some respects from those pertaining to other statutes the EEOC enforces, such as Title VII . . . and the [ADA]" and, hence, "[w]hile there may be areas of common definition, . . . counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."); *accord Gross,* 557 U.S. at 174 ("when conducting statutory interpretation," the Court must exercise the same kind and degree of care).

Petitioner ignores the fact that the Court's decisions construing the ADEA and Title VII in tandem have addressed situations quite unlike this

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ADEA. *See, e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 479-88 (2008) (considering decisions of the Court under Title IX of the Higher Education Amendments of 1972, 20 U.S.C. §§ 1681-88, and 42 U.S.C. § 1981 in determining whether retaliation claims are encompassed within the prohibition of "discrimination" in the ADEA's federal sector provision, 29 U.S.C. § 633a).

case. For instance, in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), the Court held that in at least two respects, § 14(b) of the ADEA, 29 U.S.C. § 633(b), and § 706(c) of Title VII, 42 U.S.C. §2003e-5(c), should be read in pari materia, since the former "is almost in haec verba with" the latter and "since the legislative history of § 14(b) indicates that its source was § 706(c)." *Id.* at 756.[11] The Court dismissed the respondents' pleas to recognize minor differences in language in the two provisions, and another minor difference suggested by § 14(a) of the ADEA, 29 U.S.C. § 633(a), "for which Title VII has no counterpart." *Id.* at 757. But *Evans* is of no help to Petitioner, given the nearly identical language of the provisions at issue in that case, and also because, in regard to the second issue in *Evans*, the EEOC, unlike here, favored parallel readings of the ADEA and Title VII to which the Court declared "great deference" was due. *Id.* at 761.

The Fire District's challenge also is distinctly at odds with other instances in which the Court has favored parallel readings of the ADEA and Title VII. In particular, in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), and *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Court treated the task of "mak[ing] out a prima facie case of age discrimination" under

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[11] On this basis, the Court held that "prior resort to appropriate state proceedings is required" under these provisions in both Title VII and the ADEA order "to screen from the federal courts . . . complaints that might be settled . . . in state proceedings." *Id.*

McDonnell Douglas Corp. v. *Green*, 411, U.S. 792 (1973) as indistinguishable from doing so in a Title VII case. *Thurston*, 469 U.S. at 121; *Reeves*, 530 U.S. at 140-41; *see also Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 416-17 (1985) (considering, in construing the ADEA's "bona fide occupational qualification" defense, 29 U.S.C. § 623(f)(1), "the parallel treatment of such questions under Title VII," *see* 42 U.S.C. § 2000e-2(e)(1)). In these cases, as in *Evans*, the identical or nearly identical language in the ADEA and Title VII justified parallel treatment. This case, however, presents no such identicality.

In a further striking contrast to this case, the Court in several instances has construed nearly identical language in the ADEA and Title VII quite differently. Over two decades ago, in *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996), Justice Scalia announced, for a unanimous Court, that Title VII's prima facie case framework—insofar as it requires replacement of a claimant in a protected class by someone outside that class—was too rigid for the ADEA, whose protected class consists of persons at or over age 40. *Id.* at 312-13 ("Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case."). By allowing ADEA cases to go forward in circumstances such as a 56-year-old claimant replaced by a 40-year-old, rather than only by someone 39 or under, *O'Connor*, like the Ninth Circuit decision here, recognized broader ADEA coverage than is afforded by Title VII.

The Court also rejected a simplistic rule of conformity with Title VII in *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581 (2004). There "the Court declined to interpret the phrase 'because of . . . age' in 29 U.S.C. § 623(a) to bar discrimination against people of all ages, even though the Court had previously interpreted 'because of … race [or] sex' in Title VII to bar discrimination against people of all races and both sexes." *Gross*, 557 U.S. at 175 n.2.

In 2009 *Gross* cited *Cline* as a chief example of the principle, directly contrary to Petitioner's theory of this case, that "the Court's approach to interpreting the ADEA in light of Title VII has not been uniform." *Id. Gross* also construed the nearly-identical "because of" wording in both laws differently. It endorsed "but-for" causation under the ADEA, as opposed to a "motivating factor" standard in Title VII disparate treatment cases. *Id.* at 167-168. Critical to this judgment was the fact that non-conforming amendments to both statutes (in the Civil Rights Act of 1991) resulted, as here, in significant "textual differences between Title VII and the ADEA." *Id.* at 175 n.2. Still further, *Gross* declined to apply to the ADEA the Court's prior reading—in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989)—of parallel text in Title VII pre-dating the 1991 amendment. *Gross*, 557 U.S. at 178 ("reject[ing] petitioner's contention that our interpretation of the ADEA is controlled by *Price Waterhouse*").

This Court's ADEA decisions interpreting similar language in the ADEA and Title VII—not to mention those interpreting significantly different text,

as here—alleviate any concerns that construing § 630(b) according to its terms would "put the ADEA out of sync with other anti-discrimination statutes." Pet. Br. at 43.

C. Contrary to the rigid theory of consistent construction Petitioner advances, the Court has employed a nuanced approach when interpreting divergent text that serves like aims in the ADEA and Title VII.

The decisions in *Smith* v. *City of Jackson,* 544 U.S. 228 (2005), and *Meacham* v. *Knolls Atomic Power Lab.,* 554 U.S. 84 (2008), provide a template for the critical challenge posed in this case: reconciling, on the one hand, reasons to interpret the ADEA in light of similar purposes and prohibitions in Title VII, and on the other hand, divergent statutory text and statutory history.

Above all, *Smith* and *Meacham* reflect this Court's commitment to "careful and critical examination" of statutory parallels. *Gross*, 557 U.S. at 174. Thus, both decisions honor relevant ADEA linkages to Title VII, while avoiding the rigid consistency Petitioner here espouses.

Smith upheld a "presum[ption] that Congress intended . . . text to have the same meaning in both statutes" when "Congress uses the same text in two statutes having similar purposes." 544 U.S. at 233. On this basis, the Court declared that the "unanimous

interpretation of . . . Title VII in *Griggs* [v. *Duke Power Co.*, 401 U.S. 424 (1971)]," as authorizing a disparate impact claim, was "therefore a precedent of compelling importance" in establishing disparate impact as a theory of liability under the ADEA. *Id.* at 234. The *Smith* Court also "g[o]t help from [the Court's] prior reading of . . . *Ward's Cove* [*Packing Co.* v. *Atonio*, 490 U.S. 642 (1989)] . . . that a[n ADEA] plaintiff [likewise] falls short by merely alleging a disparate impact, or 'point[ing] to a generalized policy that leads to such impact.'" *Meacham*, 554 U.S. at 100 (citing *Smith*, 544 U.S. at 241).

Yet *Smith* focused as well on the key textual disparities between Title VII and the ADEA: the "reasonable factors other than age" clause, 29 U.S.C. § 623(f)(1), and the amendment to Title VII (but not the ADEA) vitiating *Ward's Cove*. 544 U.S. at 240. Furthermore, *Meacham* applied "FLSA default rules placing the burden of proving an exemption on the party claiming it," 554 U.S. at 93, and rejected further application of *Ward's Cove* to override the FLSA's relevance to construction of the ADEA, *id.* at 98-99.

The Court's attention to details of statutory history and context in both *Smith* and *Meacham* likewise clash with Petitioner's claim, at the end of its brief, that "[i]f anything, one would expect Title VII's coverage to be uniformly broader than coverage under the ADEA." Pet. Br. at 48. The Court's reasoning in *O'Connor, Cline, Gross* and *Holowecki* reflect a far more nuanced approach.

Petitioner also alleges that since "Title VII's coverage in the private sector is broader than the ADEA's"—presumably referencing the Acts' different employee minimums, 15 versus 20—it follows that "'the problems addressed by Title VII' are 'more serious than the problem of age discrimination,'" and, accordingly, that it would be "puzzling" for the ADEA to afford more protection than Title VII "in the public sector." Pet. Br. at 49 (citing *Kelly*, 801 F.2d at 273, in turn citing *EEOC* v. *Wyoming*, 460 U.S. 226, 231 (1983)). Yet, no ruling of this Court has made such a crude comparison of the "serious[ness]" of age and other bias. To be sure, *Wyoming* said that age bias usually has a different *source,* as it "rarely [i]s based on" sheer animus and, rather, usually stems from stereotypes (also no doubt a rich source of race and sex bias). *Id.* at 230-231. But *Wyoming* also said that age bias is "profoundly harmful" as "it inflict[s] on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations." *Id.* This is so despite the ADEA's omission, thus far, of a specific remedy for psychological harm, unlike Title VII and most other federal civil rights laws.

D. The Court's comparisons of the ADEA'S public and private sector provisions have not embraced the rigid consistency urged by Petitioner.

The Court's decisions in *Gomez-Perez* and *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), offer another lens for assessing Petitioner's claim that the

ADEA's different treatment of public and private employer coverage, in terms of applying an employee-minimum, violates the principle of equal treatment of public and private employers. Both decisions rejected comparisons with the ADEA's private sector provisions as a basis for a more restrictive interpretation of the Act's federal sector provisions. The same approach is warranted in regard to the ADEA's state and local government coverage provisions enacted in 1974.

When U.S. postal worker Myrna Gomez-Perez sought to bring an ADEA retaliation claim, the Court rejected her employer's argument that the Act's federal sector provision, 29 U.S.C. § 633a, contained no specific reference to a prohibition against retaliation, unlike the Act's private sector provision, 29 U.S.C. § 623(d). 553 U.S. at 486. The Court ruled that the term "discrimination" in the Act's federal sector provision encompassed a retaliation claim. *Id.* at 488. *Gomez-Perez* also rejected Petitioner's suggestion that an abstract principle of parallel construction should trump concrete evidence of statutory meaning, including specific evidence of statutory history. *See* Pet. Br. at 46 ("The Ninth Circuit's reading creates disparities in the ADEA's treatment of public and private employers that Congress could not possibly have intended."). That is, the Court declared, "because §§ 623(d) and 633a were enacted separately and are couched in very different terms, the absence of a federal sector provision similar to § 623(d) does not provide a sufficient reason to" impute congressional purpose to exclude coverage of

retaliation from § 633a. *Gomez-Perez*, 553 U.S. at 488.[12]

Congress also enacted the first and second sentences of § 630(b) separately, in 1967 and 1974. And in the former it included an express employee minimum, while in the latter it did not. It follows, based on *Gomez-Perez*, that there is no basis for inferring a congressional purpose to similarly limit ADEA coverage of small non-federal public entities.

III. CONGRESS'S CHOICE TO APPLY THE ADEA'S PROTECTIONS TO STATE AND LOCAL PUBLIC ENTITIES OF ALL SIZES POSES NO SERIOUS DANGER TO THE SURVIVAL OF SMALL POLITICAL SUBDIVISIONS.

Petitioner grossly overstates the likely impact on small public agencies, including "special districts" like MLFD, of reading § 630(b) according to its terms. The ADEA applies to many such entities in any case

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[12] *Lehman* further undermines Petitioner's prayer for identical interpretation of differently worded amendments to the ADEA and Title VII enacted two years apart. The *Lehman* Court ruled that *contemporaneous*, different textual treatment of public- and private-sector entities required such differences to be honored, not ignored. *Gomez-Perez*, 553 U.S. at 486 n.2 ("The situation here is quite different from that . . . in *Lehman* . . . where both the private and federal-sector provisions of the ADEA already existed and a single piece of legislation—the 1978 Amendments to the ADEA—added a provision conferring a jury-trial right for private-sector . . . suits but [not] for federal sector suits.").

due to agency principles which align the liability of small public agencies with larger entities like counties in which they operate. Moreover, the history of other major federal civil rights laws that cover public entities of all sizes gives no cause for concern about "devastating effects" or "crushing" legal expenses. Pet. Br. at 54. Further, however this case resolves, the vast majority of small public subdivisions already are subject to state age discrimination laws, most of which provide complainants with much more robust monetary remedies than does the ADEA. In short, exposure to ADEA liability for small public entities is a valid concern, but is not a sound basis for ignoring § 630(b)'s plain text and indicia of Congress's intent to cover public employers of all sizes.

A. The ADEA covers many small public subdivisions due to their agency relations with another public entity.

The definition of an "employer" in federal anti-discrimination statutes including the ADEA is not limited to entities in a direct employment relationship with employees, but also incorporates "agency principles." *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754-55 (1998). Accordingly, many small public subdivisions with fewer than twenty employees themselves are actually ADEA-covered employers by virtue of their agency relationship with other "superior" public entities.

For example, in *Cink* v. *Grant Cty.,* the County Sheriff's Office fired a jailer/dispatcher after thirty

years of service. 635 Fed. App'x 470, 471 (10th Cir. 2015). Cink sued the County under the ADEA (and ADA), but lost on summary judgment. The district court concluded that the Sheriff's Office, not the County, employed Cink. The Tenth Circuit reversed, concluding that the Sheriff's office, like the County Board, was an agent of the County; it was not distinct from the County, though it was distinct from, and not controlled by, the County Board. *Id.* at 472-474.

While *Cink* assumed that § 630(b) did not cover public entities of all sizes, *id.* at 474 n.5, its case-by-case analytical approach would often result in a finding not to exempt from the ADEA "a political subdivision with many employees . . . on grounds that the immediate employing agent has fewer than fifteen employees." *Id.* at 473 (quoting *Owens* v. *Rush*, 636 F.2d 283, 286 (10th Cir. 1980)).

In weighing the alleged harm attributable to the reading of § 630(b) Petitioner challenges, it must be acknowledged that many "small" employers on whose behalf Petitioner pleads have nothing at stake in this case. They are qualified employers under the ADEA by virtue of agency principles and the Act's twenty-employee minimum, however the Court rules.

B. Other major federal civil rights laws establish liability for non-federal public entities of all sizes.

Petitioner does not explain why, if ADEA liability for small public employers is likely to be so dire, Congress has not uniformly exempted public

entities of all sizes from the reach of other major federal civil rights laws. For example, § 504 of the Rehabilitation Act of 1973—which was enacted one year prior to the statute here at issue, and which bars disability-based discrimination in employment and other operations by virtually all local and state public entities based on their receipt of "Federal financial assistance"—provides no such exemption. 29 U.S.C. § 794; *see Schrader* v. *Fred A. Ray, M.D., P.C.*, 296 F.3d 968, 969-75 (10th Cir. 2002) (concluding "[t]here is no suggestion that § 504 . . . as originally enacted, was limited to employers with fifteen or more employees"; and also ruling that § 504 does not incorporate the ADA's minimum employee coverage provision pursuant to an ADA amendment coordinating provisions of the two laws).

Nor does a small entity exemption exist in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, et seq., which prohibits discrimination on grounds of "race, color, or national origin . . . under any program or activity receiving Federal financial assistance," *id.*, § 2000d, or in the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101, et seq., which declares that "no persons in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." *Id.* at 6102. Title VI and the ADA of 1975, like § 504, apply to state and local government entities, without regard to size, 42 U.S.C. §§ 2000d-4a(1), 6107(4); 29 U.S.C. § 794(b) (all defining "program or activity" as, inter alia, "all of the operations of" every "department, agency, special

purpose district, or other instrumentality of a State or local government" receiving Federal financial assistance), albeit not in their capacity as employers. *See* 42 U.S.C. §§ 2000d-3, 6103(c).

In § 504, Congress acted, as in § 630(b), "to prohibit employment discrimination" by state and local subdivisions generally—i.e., "by *all* recipients of federal financial aid." *Conrail* v. *Darrone*, 465 U.S. 624, 634 (1984) (emphasis supplied). In *Darrone* this Court also ruled that § 504 authorized monetary relief in the form of backpay. 465 U.S. at 630 n.9. And the Court has since consistently found a "damages remedy available in private suits under Spending Clause legislation" that Congress modeled on Title VI, albeit within limits. *Barnes* v. *Gorman*, 536 U.S. 181, 185-90 (2002) (approving compensatory, but not punitive, damages under § 504) *Franklin* v. *Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (approving damages remedy under Title IX of the Higher Education Act Amendments of 1972, 20 U. S. C. §§ 1681-88, in accordance with Title VI).

C. Most state age discrimination laws already permit monetary awards in litigation involving small state and local governments.

Not only do most states have laws against age discrimination affecting all employers (public and private) or at least all public employers, whatever the size of their workforce, *see* Resp. Br. at 26, but in more than half of all states, potential monetary relief for small public entities is markedly better under state

law than under the ADEA. Such remedies include compensatory and/or punitive damages, as under Title VII and the ADA, not just backpay, as under the ADEA.[13] Thus, however this case is decided, small public subdivisions face the prospect of monetary liability if they engage in age discrimination. Moreover, in most states, financial recovery for age discrimination against small *state employers* under state law is possible. *Kimel*, 528 U.S. at 91 and n.1 (“”[s]tate employees may recover money damages from their state employers, in almost every State of the union.”). However, state employers of all sizes are immune from any monetary relief under the ADEA. *Id.* Hence, regardless of the outcome of this case, state law age bias litigation likely will be a far greater source of financial concern for most public employers than the ADEA.

Together, jurisdictions with age discrimination laws but no employee-minimum for public employers, *see* Resp. Br. at 28-29 n.6 (identifying thirty states and the District of Columbia), cover over three-quarters of

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[13] David Neumark, Ian Burns, Patrick Button & Nanneh Chehras, *Do State Laws Protecting Older Workers from Discrimination Reduce Age Discrimination in Hiring? Experimental (and Nonexperimental) Evidence*, Working Paper 2017-360 16-17 & n.26, 33-34 (Table 2) (Michigan Retirement Research Center, Mar. 2017), www.mrrc.isr.umich.edu/publications/papers/pdf/wp360.pdf (as of 2016, 29 states authorize compensatory or punitive damages under their age discrimination law, which “clearly entails stronger remedies that the [ADEA]”).

all "special districts" nationwide.[14] This leaves just 9,358 special districts across 22 remaining states as potentially affected *only* by § 630(b). And in those 22 states with state law employee-minimums, at least another 1,256 districts employ over twenty employees and, hence, are already covered by the ADEA.[15] This is also true of the likely hundreds of districts covered by state laws exempting entities with smaller numbers of employees, *see, e.g.,* Connecticut (3 employee minimum), and New York and New Mexico (4 employee minimum), as well as others in states with slightly higher minimums, *see* Pet. Br. at 39. Petitioner's estimate of affected public agencies

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[14] This figure (28,967 districts in 31 states and DC, of a total of 38,266 special districts nationwide) is based on data relied on by Petitioner. *See* Pet. Br. 11 (citing U.S. Census Bureau, *Special District Governments by Function and State: 2012* (initial data release, Sept. 26, 2013), https//tinyurl.com/y8bdha3h). Petitioner specifically cites special districts in Illinois, as "over 60% of them hav[e] fewer than 20 employees." Pet Br. at 56. Yet, the relevant statute, Ill. Comp. Stat. 5/2-101(1)(c), has no numerosity requirement for public employers.

[15] This estimate is based on 2002 Census data, the most recent on special districts by state *and size of workforce*. *See* U.S. Census Bureau, *Special District Government Employment and Payrolls by Employment-Size Group and State*, Table 17, Governments-Public Employment, Special Districts, 138 (Mar. 2002), https://www.census.gov/prod/2005pubs/gc024x2.pdf. The estimate is conservative, as there were more special districts overall in 2012 than in 2002 and because the estimate includes only entities in the "50 or more full-time employees" and "24 to 49" categories. Plainly, many other entities in the "10 to 24" category are large enough to be covered even if the ADEA only applies to public employers with at least twenty employees.

plummets to perhaps 6,000 or even fewer. Surely, the reading of § 630(b) amici favor portends no disaster.

CONCLUSION

For all these reasons, amici urge the Court to affirm the decision of the Ninth Circuit in this case.

Respectfully Submitted,

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